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Jonaidi bin Mansor v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO W–09–14 OF 2000
GOPAL SRI RAM, KC VOHRAH AND MOHD NOOR JJCA
7 AUGUST 2001

B

Criminal Law *— Dangerous drugs — Statutory presumption — Accused charged for unauthorized possession of dangerous drugs — Whether for accused to show that he did not have custody of drugs — Dangerous Drugs Act 1952 ss 6 & 37(d)*

Criminal Procedure *— Judge — Criticism of counsel in written judgment — Duty of*
C *counsel — Whether should be avoided except in extreme cases*

At 5am on the morning of 16 December 1997, a motorcar, in which the appellant and three other occupants were traveling was stopped by the police. The car was examined and a bag ('exh P10') was found in its boot. Subsequent examination established that exh P10 contained
D approximately 186g of cannabis. The appellant was charged for an offence under s 6 of the Dangerous Drugs Act 1952 ('the Act') and was tried in the sessions court. The appellant was convicted and sentenced to eight years imprisonment and ten strokes of the rattan. The appellant being dissatisfied appealed to the High Court, which affirmed the conviction and sentence and dismissed the appeal. The
E appellant then appealed to this court.

Held, dismissing the appeal:

(1) While there were many cases which laid down the circumstances in which an adverse inference may be drawn against the
F prosecution for failing to call or to offer relevant evidence, the court was of the view that failure to do so would not occasion a failure of justice in every case. In this case, the prosecution had proven custody of exh P10 to the hilt, and the court was unable to find any reason for the complaint made before it (see p 114G–H).

G (2) The court was in agreement with the interpretation of s 37(d) of the Act in *PP v Tan Tuan Seng* [1993] 2 CLJ 557. The court also agreed that the High Court judge in the present case had erred when he suggested that it was for an accused to show on a balance of probabilities that he did not have custody of the proscribed
H drug under s 37(d) of the Act. However, this was not the view expressed by the sessions court judge who had applied the correct principle. As such the appellant's complaint came to a naught as he did not suffer any injustice in the proceedings before the trial court. The court accordingly, found no reason to interfere with the decisions of the trial court (see p 115A, G–H).

I (3) The sessions court judge had approached the question of sentencing along the correct principles. There was nothing in his judgment to suggest interference by an appellate court. As

such, the court would also dismiss the appeal against the sentence (see p 116F). A

Obiter:

It must not be forgotten, most of all by judges, that counsel at the Bar were under a duty to put forward their clients' cases to the best of their ability; to take every point as they see available either on the evidence or on the law upon which they perceived the particular case turn to. Criticisms of counsel in written judgments should be avoided save in the most extreme of cases. Such an epilogue, as in this case, did very little to advance the course of justice. The court was of the view that counsel in the present case had conducted himself with complete propriety both at the trial and on the appeal before the High Court (see p 116C–E). B C

[Bahasa Malaysia summary

Pada pukul 5 pagi 16 Disember 1997, sebuah kereta, yang dinaiki oleh perayu dan tiga orang penumpang telah diberhentikan oleh pihak polis. Kereta tersebut diperiksa dan sebuah bag ('eksh P10') telah ditemui dalam butnya. Pemeriksaan selanjutnya membuktikan bahawa eksh P10 mengandungi lebih kurang 186g kanabis. Perayu dituduh melakukan kesalahan di bawah s 6 Akta Dadah Berbahaya 1952 ('Akta tersebut') dan telah dibicarakan di mahkamah sesyen. Perayu telah disabitkan dan dijatuhkan hukuman lapan tahun penjara dan sepuluh kali sebatan rotan. Perayu berasa tidak puas hati dan membuat rayuan kepada Mahkamah Tinggi, yang mengesahkan sabitan dan hukuman tersebut dan menolak rayuan tersebut. Perayu kemudian merayu kepada mahkamah ini. D E F

Diputuskan, menolak rayuan tersebut:

(1) Walaupun banyak kes yang menyatakan keadaan-keadaan di mana satu inferens yang bertentangan boleh didapati terhadap pihak pendakwaan kerana gagal untuk memanggil atau menawarkan keterangan yang relevan, mahkamah berpendapat bahawa kegagalan untuk berbuat demikian tidak akan menimbulkan satu kegagalan keadilan dalam setiap kes. Dalam kes ini, pihak pendakwaan telah benar-benar telah membuktikan hak pemilikan eksh P10, dan mahkamah tidak berupaya mencari apa-apa sebab menyokong aduan yang sekarang dibuat di hadapannya (lihat ms 114G–H). G H

(2) Mahkamah bersetuju dengan tafsiran s 37(d) Akta tersebut dalam *PP v Tan Tuan Seng* [1993] 2 CLJ 557. Mahkamah juga bersetuju bahawa hakim Mahkamah Tinggi, dalam kes ini telah terkhilaf semasa beliau mencadangkan bahawa adalah untuk tertuduh menunjukkan atas imbangan kebarangkalian bahawa beliau tidak mempunyai hak memiliki dadah yang diharamkan di bawah I

A s 37(d) Akta tersebut. Namun begitu, ini bukan pandangan yang dinyatakan oleh hakim mahkamah sesyen yang telah menerapkan prinsip yang betul. Oleh itu aduan perayu sia-sia belaka kerana beliau tidak mengalami apa-apa ketidakadilan dalam prosiding di hadapan mahkamah perbicaraan. Mahkamah dengan wajarnya, mendapati tiada sebab untuk campur tangan dengan keputusan
B mahkamah perbicaraan (lihat ms 115A, G–H).

(3) Hakim mahkamah sesyen telah membuat mempertimbangkan persoalan hukuman mengikut prinsip-prinsip yang betul. Tiada apa-apa dalam penghakiman beliau yang membolehkan campur tangan oleh mahkamah rayuan. Oleh itu, mahkamah juga akan
C menolak rayuan terhadap hukuman (lihat ms 116F).

Obiter:

Ia tidak harus dilupakan, lebih-lebih lagi oleh hakim-hakim, bahawa peguam di Majlis Peguam adalah di bawah satu kewajipan untuk
D mengemukakan kes-kes anak guam mereka dengan kebolehan mereka sebaik mungkin; untuk mengambil perhatian setiap perkara yang mereka fikirkan perlu sama ada di atas keterangan atau undang-undang yang mereka fikirkan adalah asas kes tertentu itu. Kritikan-kritikan terhadap peguam dalam penghakiman bertulis sepatutnya dielakkan kecuali dalam kes-kes keterlaluan. Epilog sedemikian,
E sebagaimana yang didapati dalam kes ini, tidak membantu perlaksanaan keadilan. Mahkamah ini berpandangan bahawa peguam dalam kes sekarang ini telah mengendalikan diri beliau dengan penuh tatasusila semasa perbicaraan dan juga semasa rayuan di hadapan Mahkamah Tinggi (lihat ms 116C–E).]

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Notes

For cases on statutory presumption under s 37(d) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 77–80.

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Cases referred to

PP v Tan Tuan Seng [1993] 2 CLJ 557 (refd)

H **Legislation referred to**

Dangerous Drugs Act 1952 ss 6, 37(d)

Appeal from: Criminal Appeal No 42–35 of 1999 (High Court, Kuala Lumpur)

I

Gobind Singh Deo (*Karpal Singh & Co*) for the appellant.
Chan Bee Keng (Deputy Public Prosecutor) for the respondent.

Gopal Sri Ram JCA (delivering oral judgment of the court): At about 5am on the morning of 16 December 1997, a motorcar in which the appellant and three others were travelling was stopped by the police. The car was examined and a bag (exh P10) was found in its boot. Subsequent examination established that exh P10 contained approximately 186g of cannabis. The appellant was charged for an offence under s 6 of the Dangerous Drugs Act 1952 ('the Act') and was tried before the sessions court. At the conclusion of the prosecution's case during which the other three occupants were called as witnesses, the learned judge found the appellant had a case to answer. The appellant gave evidence on oath in his defence and was cross examined. At the end of the whole case, the learned sessions judge concluded that the charge against the appellant was proven beyond a reasonable doubt. He convicted the appellant and sentenced him to a term of eight years imprisonment and to ten strokes of the rattan. The appellant being dissatisfied appealed to the High Court which affirmed the conviction and sentence and dismissed the appeal. But for some comments made by the High Court in the course of its judgment, we would have found it unnecessary to give written reasons for our decision in this case.

A careful scrutiny of the evidence which we have undertaken reveals that the appellant was in occupation of a room which was disjoined from the appellant house. It is part of the prosecution's case that at the material time, the appellant removed exhs P9 and P10 from the room in question, brought them to the car and placed them in its boot. The learned sessions judge rightly found, on the evidence (including those circumstances I have just adverted to) that the appellant had exclusive custody of exh P10 and the drugs in question. We have read and re-read the judgment of the sessions court with much care and attention. We are unable to discern any error or misdirection or a failure to judicially appreciate the evidence. We are satisfied that the sessions judge had directed his mind properly upon the facts and came to the right decision on the evidence available to him. It was suggested by counsel by the appellant that there was a serious irregularity in the trial because the appellant's mother, brother and niece from whom statements had been taken were not called as witnesses for the prosecution or offered to the defence. Counsel for the appellant submitted that an adverse inference should be drawn against the prosecution for this failure. He also suggested that there was a gap in the evidence so that a reasonable doubt arose as to the custody of exh P10, the benefit of which should go to the appellant. With respect, we do not agree. While there are many cases which lay down the circumstances in which an adverse inference may be drawn against the prosecution for failing to call or to offer relevant evidence, it is our view that a failure to do so would not occasion a failure of justice in every case. Here, the prosecution has proven custody to the hilt, and we are therefore unable to find any reason for the complaint now made before us.

To recall, the appellant was convicted by the sessions court in a judgment satisfactorily directed on the facts and the law. He was not convicted by anything that the High Court said at the first appellate stage, however erroneous its findings may be. The High Court judge examined the primary facts and he concurred with the decision of the sessions judge.

Unfortunately, he expressed his own views upon the nature of the presumption arising under s 37(d) of the Act. There are passages in his judgment which suggest that it is for an accused to show on a balance of probabilities that he did not have custody of the proscribed drug under s 37(d) of the Act. Counsel for the appellant submitted that this was an erroneous statement of the law and cited a helpful passage in the judgment of Visu Sinnadurai J in *PP v Tan Tuan Seng* [1993] 2 CLJ 557, where he said:

> Section 37(d) is applicable whenever a person is found to have in his custody or control anything containing dangerous drugs. This section envisages by the use of the word 'anything' that the drugs were contained in a container or receptacle. Once it is established by the prosecution that the accused had in his custody or possession the container containing the drugs, the accused is deemed to be in control of the drugs. In such a case, there is no need for the prosecution to go any further to prove possession of the drugs on the part of the accused. Though knowledge is an essential ingredient of the offence of possession, the need to establish knowledge as a separate ingredient is dispensed with by the fact that the prosecution by establishing custody or control has activated the presumption of possession. Implicit in the accused having knowledge, is that the element of knowledge of the drugs by the accused is also presumed, for without knowledge (presumed) there cannot be possession. In other words, once the presumption has been activated, the accused is deemed to have possession, and as he is deemed to have possession, he is also deemed to have knowledge: see however the views of Wilson J in *Choo Teck Soon v PP* [1954] MLJ 63 where a different approach was taken as the wording in the then legislation was different.
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> It is sometimes said that knowledge, in such circumstances is presumed under the last limb of s 37(d), that is, by the words 'he is deemed to have known the nature of the drugs'. This appears to be a mis-interpretation of the section as these words merely dispense with the need for the prosecution to establish that the accused knew the exact nature or quality of the drugs: see *Lockyer v Gibb* [1966] 2 All ER 653 at p 656 (CA) and as explained in *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356 (HL). It should be noted that it is for this reason that the last limb of s 37(d) does not provide by saying that the accused is also deemed to have knowledge of the drugs. To do so would have been superfluous, since the accused is already deemed to have possession, which of course must mean that he is presumed to have knowledge.

We are in agreement with the interpretation of s 37(d) of the Act given it by Visu Sinnadurai J. We are also in agreement with counsel that the learned judge was in error when he made the statement complained of. However, that was not of the view expressed by the learned sessions court judge who applied the correct principle. As such the appellant's complaint comes to naught as he did nor suffer any injustice in the proceedings before the trial court. Accordingly, we find no reason to interfere with the decision of that court.

There is one other matter. In the concluding paragraph of his judgment, the learned High Court judge made the following comment:

> While counsels (*sic*) have a right to appear and plead before the courts on behalf of their clients, and therefore have a duty to make submissions on their

> behalf, they must not forget they have a responsibility for the submissions that they make. They are not simply parrots for their clients, saying for the clients what they want. The interest of the client that he must uphold fearlessly is not to obtain an acquittal at all costs, but only that the client is entitled to, nothing less. The interest of justice, which he must uphold equally fearlessly means also that the client is not entitled to more than what is just to him. This he can best achieve by not practising any deception, but by practising candour, courtesy and fairness, referring only to facts that he is in a position to prove, not misquoting, and to apply himself to bringing all relevant binding decisions that he is aware of and immediately in point, whether it be for or against his contention. He must apply himself so that he is knowledgeable and precise as to what he is submitting upon. The dignity and standing of the counsel, and that of his profession, unlike that of spectator sports and its contestants, is measured by this honorable criterion. The triumph in which we can all exult together, is in that justice is done, and nothing less.

These comments were wholly unnecessary. Nothing that counsel put forward in the court of first instance or the High Court warranted them. It must not be forgotten, most of all by judges, that counsel at the Bar are under a duty to put forward their clients' cases to the best of their ability; to take every point they see available either on the evidence or on the law upon which they perceive the particular case to turn. Criticisms of counsel in written judgments should be avoided save in the most extreme of cases. Such an epilogue that we find here does little to advance the course of justice. In our view, counsel in the present case conducted himself with complete propriety both at the trial and on the appeal before the High Court.

For the reasons given, the appeal against conviction is hereby dismissed.

A few moments ago, we had dealt with two other cases of drug trafficking. I observed the high degree of frequency with which these offences are being committed despite efforts by Parliament to stamp them out. In our view, the sessions judge had approached the question of sentencing along the correct principles. There is nothing in his judgment to suggest interference by an appellate court. As such, we would also dismiss the appeal against sentence.

The conviction and sentence is therefore affirmed.

Appeal dismissed.

Reported by Peter Ling